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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 842

ISIDORE S. ROSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Isidore S. Rosen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 22, 1965.

Citations to Opinions Below

The judgment of conviction and commitment by the District Court is printed at page 12 hereof and is unreported. The opinion of the Court of Appeals is printed at pages 13-15 hereof and is not officially reported.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 22, 1965. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

Questions Presented

1. Whether the testimony compelled from the petitioner who was a "de facto" defendant at the time he was summoned to appear before the Grand Jury was in violation of his constitutional rights as to counsel and against self incrimination? Whether prosecutors can summon before a Grand Jury a person against whom an indictment is being sought and interrogate him isolated from the protection of counsel?

2. Whether the second count of perjury submitted to this jury was so vague and indefinite as to be violative of appellant's constitutional rights and preclude petitioner from receiving a fair trial? Whether the question asked of the petitioner was so vague as to be void for indefiniteness?

Statutes Involved

1. Title 18 United States Code Sect. 1621.

2. Fifth and Sixth Amendment of the United States Constitution.

The texts of these provisions are printed, *infra* page 16.

Statement

On May 15, 1963, petitioner, a Federal Housing Administration inspector, was subpoenaed to appear before a Federal Grand Jury which was conducting an investigation

into alleged bribery, graft, extortion and other illegal practices in the building industry in the Eastern District of New York. It appeared that petitioner was to testify as a witness on the Government's behalf.

Pursuant to the subpoena, petitioner presented himself at the office of Assistant United States Attorney Grunewald, who questioned him preliminary to his appearance before the Grand Jury (23). At that time the prosecutor showed petitioner a form waiver of immunity (33). Thereafter Mr. Grunewald, called petitioner into the Grand Jury room where he was questioned. At no time prior to petitioner's testifying did the prosecutor inform petitioner of his right to counsel or of any of the previously adduced testimony before the Grand Jury implicating him in any crime. This Grand Jury investigation had been in progress for approximately six months prior to petitioner's appearance unbeknownst to him and some one hundred (100) builders and F.H.A. personnel had testified (13, 23).

At the outset of his interrogation, petitioner was told by the foreman of the Grand Jury that he was the "subject" of the investigation being conducted by that body and a "prospective defendant" (15, 31). He was further advised that anything he said could be used against him and that he could assert his Fifth Amendment rights and refuse to testify to matters which might tend to incriminate him (32).

At the trial of the instant indictment, the Government's direct case consisted principally of the testimony of the various builders who had previously testified before the Grand Jury to having given money to petitioner. Testifying in his own behalf, petitioner steadfastly maintained that he had never received any money from any of these builders (582).

The specific question which petitioner is alleged to have answered untruthfully in Count 2 of the instant indict-

ment, for which he stands convicted, is as follows:

> "Q. Have you had occasion to accept any gratuities from, not only any builder, but any construction representative of a builder, such as his construction superintendent or anyone else? A. No, sir."

The testimony of all the prosecution witnesses as to dates, places, amounts and circumstances surrounding the receipt of gratuities were very hazy and equivocal (100, 135).

On the same day that the perjury indictment was filed a bribery indictment, pursuant to title 18, United States Code, Section 202 was also filed, which in essence charges the petitioner with wilfully and knowingly accepting and receiving monies while in the employment of the Federal Housing Administration with the intent to have his decisions and actions influenced thereby.

The prosecution elected to proceed to trial on this perjury indictment and has done nothing with regard to the bribery indictment.

The Jury found the petitioner guilty on the one count of perjury submitted to them and Judge Bruckhausen sentenced the petitioner to a term of one year and a day. The Court of Appeals affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

POINT I

The testimony compelled from the petitioner who was a "de facto" defendant at the time he was subpoenaed to appear before the Grand Jury, was violative of his constitutional rights.

It is clear that the petitioner was at the time of his interrogation a "de facto" defendant, a tagret of this Grand Jury investigation and thus entitled to all the constitutional rights of an accused.

A perjury indictment following an ex parte inquiry or investigation in which the defendant has been the subject of the investigation demands close scrutiny. See VIII, *Wigmore,* Sects. 2250, 51; *History & Policy of Privilege of Counselman* v. *Hitchcock,* 142 U. S. 547; *U. S.* v. *Edgerton,* 9 Cir., 80 F. 374.

The "ex parte" procedure lends itself to obvious abuses and is capable of giving rise to violation of personal rights. The privilege against self-incrimination was an important advance in the development of our liberty. It reflects many of our fundamental values and most noble aspirations over unwillingness to subject those suspected of crimes to the cruel trilemma of self-accusation, perjury or contempt. *United States* v. *Thayer,* 214 F. Supp. 929; *United States* v. *McNabb,* 318 U. S. 332.

The very atmosphere of a Grand Jury is somewhat coercive, partly because the witness may fear indictment and partly because of his unfamiliarity with the proceedings and partly because of the general atmosphere of secrecy.

Furthermore, the petitioner was a Federal career employee and was placed in the untenable position wherein if he refused to testify, or invoke his privilege against self-

incrimination, or refused to sign a waiver of immunity, he would immediately lose his job and all of the rights which accrued to him over a long tenure as a Federal employee.

"Indeed a Prosecutor should refrain in all cases from calling as a witness before a Grand Jury any person who is de jure or de facto an accused." *United States* v. *Scully,* 225 F. 2d 113, 116; *United States* v. *Dardi,* 330 F. 2d 316, 336.

This principle appears to be the rule in the State of New York (*People* v. *Laino,* 10 N. Y. 2d 161, 170, 171; *People* v. *Gillette,* 126 App. Div. 665, 111 N. Y. Supp. 133, 135-136) and is not without precedents in the Federal Courts (see e.g. *United States* v. *Kimball,* 177 Fed. 156; *United States* v. *Edgerton,* 80 Fed. 374; *United States* v. *Lawn,* 115 F. Supp. 674, app. dis. sub. nom.; *United States* v. *Roth,* 208 F. 2d 467.

In *Jones* v. *United States,* 342 Fed. 2d 863, C.A.D.C., decided 2/6/64, Justice Edgerton in discussing this point, stated:

> "We cannot reconcile that procedure, which was used in this case, with the Fifth Amendment guarantee that 'No person shall be compelled in any criminal case to be a witness against himself.'
>
> "Like a trial, a grand jury investigation of a crime is 'a criminal case' at which incriminating questions need not be answered. Counselman v. Hitchcock, 142 U. S. 547, 562 (1892). At a trial, putting the accused on the witness stand without his consent and asking him anything at all would violate his constitutional privilege against self-incrimination. We think taking him before the grand jury without his consent and asking him anything violates his privilege. This is perhaps implicit in the Supreme Court's action in Lawn v. United States, 355 U. S. 339 (1958). If it is not and ours is a minority view, see U. S. v. Cleary, 265 F. 2d

459, as the New York Court of Appeals said in a different connection. 'We may as well disregard the weight of authority elsewhere and start with a rule of our own, consistent with practical experience * * * Consistency requires us to go forward or to go back. We cannot go back * * *. The present distinction is indefensible.' Campbell v. New York Evening Post, 245 N. Y. 320, 157 N. E. 153 (1927).

"Mere interrogation before a grand jury may harm the accused as much as mere interrogation at a trial. Even if he makes 'no direct incriminating statement, there is no way to know whether in fact his appearance was incriminating in the minds of some or all the members of the Grand Jury.' United States v. DiGrazia, 213 F. Supp. 232, 234 (N. D. Ill. 1963). His having been brought there may arouse suspicion. His manner and voice may arouse suspicion. Because grand jury investigations are secret, as we said in Powell he is 'isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public.' Though he may be unqualified, to decide for himself what questions to answer, he must decide at his peril. If he answers incriminating questions he may make it certain, that he will be indicted. And testimony before the grand jury may be used to impeach his testimony at trial. If he refuses to testify at all, or to answer some questions on the ground that answers might incriminate him, the grand jury may draw conclusions. If he refuses to answer questions that are not incriminating, he may be guilty of contempt."

The New York Courts have consistently held that it is a violation of a prospective defendant's constitutional rights to require him to attend before a Grand Jury and take an oath. Accordingly, "an indictment obtained against him in that way would be invalid, and he could not be convicted of perjury for the testimony which he gave, inasmuch as

the oath could not be legally administered to him" (*People* v. *Gillette, supra*). The fatal defect resulting from the violation of the prospective defendant's rights attaches not only to the indictment charging a substantive crime, but also any indictment or citation for contempt or perjury (*People* v. *Laino,* 10 N. Y. 2d 161, 171; see also, *Sobel, The Privilege Against Self-Incrimination "Federalized",* 31 Brooklyn L. Rev. 1, 29).

The leading case holding to the contrary is *United States* v. *Cleary,* 265 F. 2d 459, cert. den. 360 U. S. 936. We submit, however, that the *Cleary* decision has been overruled by implication by such recent decisions of this Court, as *Escobedo* v. *Illinois,* 378 U. S. 478, and *Massiah* v. *United States,* 377 U. S. 201, and perhaps *Lawn* v. *United States,* 355 U. S. 339.

This Court said in *Cleary*:

> "Accordingly the question here is not so much whether Cleary knowing his constitutional rights conclusively elected not to assert them but whether the testimony was freely given, all things considered."

In *Cleary* several different warnings were given to the defendant on different occasions both in and out of Court by the prosecutor.

It is respectfully submitted that if *Cleary* is the law prevailing then the mere "pro forma" giving of warning is not controlling, although it may be considered an element among all things considered. The testimonial compulsion exerted on petitioner is self evident.

The "investigating agency cannot be allowed to 'zero in' so to speak, on the witness without advising him that if he persists, he will be prosecuted for perjury. An indictment charging an offense which is entirely the work product of the Government cannot be upheld." *United States* v. *Thayer,* 214 F. Supp. 933.

In *Escobedo,* this Court held:

> "only when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose to elicit a confession our adversary system begins to operate and under the circumstances here, the accused must be permitted to consult his lawyer".

It is respectfully submitted that the petitioner had become an accused under *Escobedo,* and his right to counsel, attached to a grand jury proceeding.

The instant case is clearly distinguishable from *Cleary* in that sufficient warning was not given to the petitioner.

It is respectfully submitted that in view of the *Lawn* and *Jones* cases cited herein and the expansion and development of the right to counsel, the rationale and holding in *Cleary* has been completely undermined.

POINT II

The second count of perjury indictment submitted to the jury in this case was so vague and indefinite as to be violative of petitioner's constitutional rights and void for indefiniteness.

The prosecution had proceeded from the outset of the case on the basis of four counts of perjury. A motion was made at the end of the prosecution's case by petitioner for the Government to elect as to one count under the indictment because of the duplicitous effect therein (421-422). It was only after summation and just prior to charging the Jury that the Government consented to the Jury deliberating on one count and selected the one count it desired.

An indictment must charge an offense with such reasonable certainty that the accused can make his defense. *U. S.* v. *Cruikshink,* 92 U. S. 542.

The charge in the indictment submitted to the Jury was violative of petitioner's constitutional rights and is challenged as being vague and indefinite. *United States* v. *Latimer*, 127 F. Supp. 405.

The test that has been formulated from the *Latimer* case appears to be, whether the minds of the questioner and the answerer met with regard to the question which forms the basis for the indictment. The question in the count submited to the Jury was as follows:

> "Q. Have you had occasion to accept any gratuities from, not only any builder, but any construction representative of a builder, such as his construction superintendent or anyone else? A. No, sir."

Even if it may be assumed that petitioner knew what gratuity meant, this fact does not cure the improper question which was asked by the Prosecutor. The first portion of the question: "Have you had occasion to accept any gratuities" is capable of various connotations and when it is coupled with the end of the question "or anyone else" the question becomes so broad and so all encompassing that it would be impossible for a reasonable person to come to a conclusion as to what was meant by the Prosecutor. We know now that what the Prosecutor meant to ask was "Did the petitioner receive any gratuities", but this was not the question posed. There was no allegation in this question nor in any of the other questions made part of this indictment wherein a time, a place, or a person from whom the petitioner accepted gratuities was ever divulged or presented by the Prosecutor.

The question in its present form could have application to any type of occasion during the petitioner's lifetime with any person when he received a gift of any kind.

Under the *Latimer* case there does not appear to be a meeting of the minds between the Prosecutor and this peti-

tioner. It is respectfully submitted that such a question cannot be clear to the mind of any reasonable person answering such question or to the Jury who is determining the guilt or innocence of the petitioner on the basis of his answer to such improper question.

It is respectfully submitted that the prosecution must allege enough to give the petitioner insight into the charge against him. The indictment charging perjury and particularly count two submitted to the Jury was so vague and indefinite as to completely preclude any possibility of petitioner's being properly informed of the nature of the charge against him and could not enable the Jury to fairly reach a verdict. *United States* v. *Cobert,* 227 F. Supp. 915; *United States* v. *Simplot,* 192 F. Supp. 734.

CONCLUSION

It is therefore respectfully prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Judgment and Commitment.

On this 26th day of March, 1965 came the attorney for the government and the defendant appeared in person and with counsel.

IT IS ADJUDGED that the defendant has been convicted upon a verdict of guilty of the offense of violating T-18 U.S.C. Sec. 1621, that on or about May 15, 1963, the defendant appeared as a witness before the Federal Grand Jury for the Eastern District of New York duly impanelled and sworn, and being under oath, defendant testified falsely as to material matters before said Grand Jurors as charged in count Two (2) and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) year and One (1) day. Bail set at $2500.00 pending appeal.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

WALTER BRUCHHAUSEN,
United States District Judge.

.....

(Signed) .....

(By) .....
Deputy Clerk.

Opinion and Decision of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 123—September Term, 1965.

(Argued November 3, 1965 Decided November 22, 1965.)
Docket No. 29739

UNITED STATES OF AMERICA,

Appellee,

—v.—

ISIDORE S. ROSEN,

Defendant-Appellant.

Before:

KAUFMAN, HAYS, *Circuit Judges,* and
TIMBERS, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York, Walter Bruchhausen, *Judge,* based upon a verdict of a jury, convicting defendant of perjury in violation of 18 U. S. C. § 1621.

Affirmed.

JEROME C. DITORE, Assistant United States Attorney (Joseph P. Hoey, United States Attorney for the Eastern District of New York), *for Appellee.*

* Chief Judge of the District Court of Connecticut, sitting by designation.

EDWIN GOLD, New York City (Michael J. Lazar and Gold, Lazar & Cooper, New York City, on the brief), *for Appellant.*

PER CURIAM:

This is an appeal from a judgment of conviction entered upon the verdict of a jury which found appellant guilty of having commited perjury while testifying under oath before a Federal grand jury. 18 U. S. C. § 1621.

In so far as appellant's arguments are concerned with materiality and with self-incrimination and the right to assistance of counsel, decision is controlled by *United States* v. *Winter*, 348 F. 2d 204, 207-08, 210-11 (2d Cir. 1965), which presented exactly the same fact pattern as is presented by the instant case. These arguments were properly rejected in that case and need not be discussed again here.

Appellant was originally indicted on four counts; he initiated the effort and made the motion to limit the jury's deliberation to one count. The count placed before the jury charged Rosen with having falsely answered the following question:

> "Have you had occasion to accept any gratuities from, not only any builder, but any construction representative of a builder, such as his construction superintendent or anyone else?"

It is true that the question is inarticulately phrased. But, when taken in the context of the entire grand jury proceeding, it is not so vague and indefinite as to misinform the defendant about the nature of the charge against him.

Rosen was quite aware of the meaning of the term "gratuities." Before answering the question of which he now complains, he was asked to define "gratuities" and an-

swered "a gift of any kind." Appellant denied that he had received any money from anyone engaged in the building of houses. He denied the receipt of "any gratuity," including liquor, after 1957. At the trial one builder after another testified that appellant had accepted gratuities during a period commencing in 1959. Given his protracted testimony before the grand jury and the evidence presented at trial it is inconceivable that either appellant or the jury could have been mistaken about the nature and content of the charge against him. In this context "Have you had occasion to accept" clearly meant "Have you on any occasion accepted any gratuities."

There is no merit in any of appellant's other arguments. Rosen's allegations that the prosecutor engaged in varying types of "misconduct" are not supported by the record. Grand jury minutes may properly be used to refresh a witness' memory. Upon the request of appellant, Judge Bruchhausen inspected the grand jury testimony of one witness; he properly declined to turn over the minutes.

Affirmed.

Statutes Involved

Title 18, United States Code, Sec. 1621:—Perjury

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury. . . ."

Constitutional Amendments Involved

United States Constitution:

Fifth Amendment:

No person . . . shall be compelled in any criminal proceeding to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Sixth Amendment:

In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.